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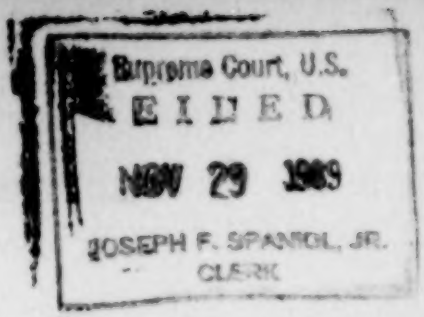

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1989

DWIGHT H. OWEN
Petitioner

vs

HELEN OWEN
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ISIDORE KIRSHENBAUM
1900 Main Street
Sarasota, Florida

QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly interpreted and applied 11 USC 522(f)(1) in denying lien avoidance, with respect to otherwise exempt property, based upon Florida law which provides that certain judgment or judicial liens create exceptions to the exemptions.

2. Whether a state law provision that creates exceptions to state homestead exemption for certain judgment liens based upon the time that the lien attaches is a premissible exemption provision for a state which has "opted out" of the federal exemptions when such "exception" is a judicial lien within the application of 11 USC 522(f)(1).

STATEMENT PURSUANT TO RULE 28.1

Dwight H. Owen is an individual petitioner

Helen Owen is an individual respondent

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TABLE OF AUTHORITIES

Cases

OPINIONS BELOW

The July 11, 1989 opinion of the 11th Circuit Court of Appeals, whose judgment is herein sought to be reviewed, is reported at 877 F.2d 44 (11th Cir. 1989) and is reprinted in the Appendix to this petition at A1. The prior opinion of the United States District Court, Middle District of Florida, entered on June 7, 1988, is reported at 86 B.R. 691 (DC MD Fla 1988), and is reprinted in the Appendix at A13. The prior opinion of the United States Bankruptcy Court, Middle District of Florida, entered on February 8, 1988, was unreported and is reprinted in the Appendix at A24.

JURISDICTION

The decision of the 11th Circuit Court of Appeals was entered on the 11th day of July 1989 and affirmed the decision of the United States District Court, Middle District of Florida. (A1) A timely filed Petition for Rehearing and Suggestion for Rehearing In Banc were denied on the 31st day of August 1989. (A28) This Court has jurisdiction pursuant to 28 USC 1254(1).

STATUTES INVOLVED

Title 11, United States Code §§ 522(b), 522(f), reproduced at (A33-35).

Section 222.20, Florida Statutes, reproduced at (A39).

STATEMENT OF THE CASE

1. INTRODUCTION

The Petitioner, the debtor in a Chapter 7 bankruptcy case, sought to avoid Respondent's judgment or judicial lien, pursuant to 11 USC 522(f)(1), upon the debtor's homestead real property which was claimed and allowed as exempt in the bankruptcy proceedings. The courts below held the lien to be unavoidable because the law in Florida, which has "opted out" of the federal exemptions, permits enforcement of this lien. Under state law, the attachment of Respondent's judgment as a lien created an "exception" to the otherwise available exemption.

Petitioner contends that the plain language of 11 USC 522(f) permits avoidance and that the state created "exception" under 11 USC 522(b) remains subject

to the provisions of 11 USC 522(f). The Petitioner also contends that to permit state law definitions of "exceptions" to include judgment or "judicial" liens (to which 11 USC 522(f) should apply), would authorize state law nullification, or "opting out", of the federal lien avoidance provision, a result not consistent with proper statutory interpretation.

II. THE FACTS

There is no dispute as to the facts. The Respondent obtained a money judgment against the Petitioner in circuit court, Manatee County, Florida in December 1975. A certified copy of that judgment was recorded in the public records of Sarasota County, Florida on 29 July 1976. At that time Petitioner owned no property in Sarasota County.

On 27 November 1984, Petitioner acquired record fee ownership of the real

property at issue herein, Unit 304 of Embassy House, a condominium, located in Sarasota County. At that time, Petitioner was a single man and not "the head of a family" as was then required for entitlement to the Florida Constitutional homestead exemption. Article 10, Section 4, Fla. Const.

On 6 November 1984 the citizens of Florida approved an amendment to the constitutional homestead provision which substituted "a natural person" for the previously required "head of a family".

That amendment became effective on 8 January 1985. Article 11, Section 5(c), Fla. Const.

Under Florida law, no judgment is a lien upon any property until property is owned by the judgment debtor. First National Bank of Chipley v. Peel, 145 So. 177 (Fla. 1933), Bowers v. Mozingo, 399 So. 2d 492 (Fla. 3d DCA 1981). A duly

recorded judgment against a debtor becomes a lien upon that debtor's real property at the time the debtor acquires ownership of real property in the county in which that judgment is recorded. B.A. Lott, Inc. v. Padgett, 14 So. 2d 667 (Fla. 1943). Thus, the Respondent's judgment attached as a lien at the time the above property was acquired by Petitioner on 27 November 1984. In addition, a judgment which attaches as a lien upon the debtor's property at a time when the debtor is not eligible to claim the homestead exemption will remain enforceable despite the fact that the debtor later qualifies for the exemption. Aetna Insurance Co. v. LaGasse, 223 So. 2d 727 (Fla. 1969). Although the attachment of such a lien does not prevent subsequent acquisition of the homestead right, see Lamb v. Ralston Purina Co., 21 So. 2d 127 (Fla. 1945), such a lien will remain enforceable

even as to homestead property. See Porter-Mallard Co. v. Dugger, 157 So. 429 (Fla. 1934). As a result, under state law the Respondent's lien is enforceable despite acquisition of the right to assert the exemption.

On 13 January 1986, the Petitioner filed his Chapter 7 bankruptcy petition and claimed the above property as exempt as his homestead on his B-4 schedule, in accordance with Chapter 222.20, Florida Statutes (A39), the provision which limits Florida debtors to state, rather than federal, exemptions in bankruptcy. The bankruptcy court allowed this exemption for purposes of general administration of the estate. The exemption was allowed because the relevant date for determining exemption entitlements is measured by the exemption provisions in effect on the date of the filing of the petition. 11 USC 541, In Re Zahn, 605 F. 2d 323 (7th

Cir. 1979) cert den 444 US 1075, 100 S Ct 1072, 62 L Ed 2d 757 (1980), Lewis v. Manufacturer's National Bank, 364 US 603, 81 S Ct 347, 5 L Ed 2d 323 (1961).

In due course the Petitioner received his bankruptcy discharge. Thereafter, the court permitted the case to be re-opened, at Petitioner's request, for the purpose of filing a motion to avoid Respondent's lien pursuant to 11 USC 522(f). The order of 8 February 1988 (A24) in which the bankruptcy court held the lien to be unavoidable is the order appealed to the District Court and Court of Appeals. The District Court (A13) and Court of Appeals (A1) both affirmed the bankruptcy court.

III. ARGUMENT

In denying lien avoidance, the opinions below have focused primarily upon the survivability of the lien provided by state law. The opinions have failed to independently apply the plain language

of 522(f). The bankruptcy court opinion at (A26), quoted by the Court of Appeals at (A 5), recites only the rule of survivability under state law. Furthermore, in concluding that "a judicial lien" could be construed as the characteristic which creates an "exception" to the exemption, the Court of Appeals not only failed to observe prior 11th Circuit precedent, see In Re Hall, 752 F. 2d 582 (11th Cir. 1985), but set forth a prescription for nullification of the "judicial lien as an impairment" concept so clearly set forth in 522(f)(1).

In other words, Congress specifically allowed states to devise their own lists of types and quantities of property which could be exempted in bankruptcy. This is the "opt out" provision found in 522(b). No similar option is accorded to the states under 522(f), however. The lien avoidance provision under 522(f) applies to both

state and federal exemptions alike. Each section serves distinct purposes and well settled principals of statutory construction requires that those sections be construed in such a way as give effect to each. 522(b) is designed to identify exemptions. 522(f) is designed to permit removal of certain obstacles to the enjoyment or assertion of those exemptions. A characteristic which is identified under 522(f) as an obstacle to the enjoyment or assertion of an exemption can not at the same time be designated, by state law, as an "exception" to the exemption described in 522(b). Such a definition under 522(b) would, all too obviously, nullify or defeat the use and purpose of 522(f). Not only is such a result inconsistent with proper statutory construction, but it can not be assumed that Congress intended that exemptions under 522(b) could be defined in such a way, under the "opt out"

provision, that 522(f) would be rendered functionless. The precise situation outlined above is presented in Owen and the decision of the Court of Appeals fails to properly resolve it. See the opinion of the Court of Appeals at (A 8-9).

Here, the Petitioner meets the requirements for lien avoidance, i.e. 1) the lien is a judicial lien within the code definition of that term, 2) the lien has attached to his property and is enforceable against it unless avoided, hence impairment, 3) the property qualified as his homestead on the date of the filing of the Chapter 7 petition and therefore is an exemption to which the debtor "would have been entitled."

REASONS FOR GRANTING THE WRIT

The essential question presented in this case concerns the relationship between two significant code provisions, i.e. 11 USC 522(b) and 11 USC 522(f). The proper application of the federal lien avoidance provision, 522(f), to state exemption schemes enacted pursuant to the "opt out" provision of 522(b) is an issue which has produced conflicting decisions among the circuits, conflicting decisions within the 11th Circuit and uncertainty as to the scope of state authority under the Code.

CONFLICT AMONG THE CIRCUITS

1. The following cases have indicated that 522(f) must be applied in states which have enacted their own exemptions. The 2d, 4th, 8th, 10th and 11th circuits indicate that it is federal, rather than

state, law which governs lien avoidance. In Re Brown, 734 F.2d 119 (2d Cir. 1984) authorized avoidance of a judicial lien where, in the absence of the lien, the exemption could be enjoyed. Dominion Bank of the Cumberlands, NA v Nuckolls, 780 F.2d 408 (4th Cir. 1985) authorized avoidance of a lien pursuant to 522(f) notwithstanding its enforceability under state law. In Re Thompson, 750 F.2d 628 (8th Cir. 1984) noted that, although state law may control exemptions, federal law determined lien avoidance availability, and that exemption statutes and lien avoidance provision served different purposes. In Re Leonard, 866 F.2d 335 (10th Cir. 1989) cited the rule that states may not "opt out" of lien avoidance provision, noting, at pg 336-337,

> "...The debtor's right to claim avoidance of a lien on property under 522(f) is determined by

> considering whether the property, if unencumbered, is exempted under the state statutory exemptions..."

and concluding that avoidance was appropriate where state law allowed such property to be exempted if unencumbered.

In Re Hall, 752 F.2d 582 (11th Cir. 1985) the Court, in reviewing a Georgia statute which permitted a debtor to exempt property only if it was not encumbered by a lien, stated

> "This Section 522(f) operates to permit a debtor to avoid the fixing of a lien on property if that avoidance would allow the debtor to enjoy the exemption. The very purpose of the statute is to permit debtors to claim, or exempt, property completely or partially secured by an otherwise valid lien. To permit states to inhibit the lien avoidance provision by simply defining all lien encumbered property as 'not exempt' would render the statute useless, a result inconsistent with the well established principal of statutory construction requiring that all parts of an act be given effect if at all possible"

The lien avoidance provision was intended to apply to state exemptions, notwithstanding state limitations on the ability

of the debtor to exempt lien encumbered property. Hall, above, at pg 587

The foregoing cases indicate that states may not opt out of lien avoidance even though they have chosen state exemptions. The Court of Appeals in Owen has, however, effectively permitted Florida to "opt out" of lien avoidance by approving a state law "exception" for property subject to an otherwise avoidable lien.

2. The following cases have approved state law limitations on lien avoidance under 522(f). The 5th and 6th circuits permit state definitions of exemptions which renders lien avoidance unavailable. In Re Pine, 717 F.2d 281 (6th Cir. 1983) cert den 466 US 928, 104 S Ct 1711, 80 L Ed 2d 183 (1984), concluded that the authority given states under 522(b) to select exemptions included the authority to exclude encumbered property from those exemptions. In Re McManus, 681 F. 2d 353,

(5th Cir. 1982) similarly concluded that state definitions of exceptions could preclude lien avoidance. Because Louisiana law had defined otherwise exempt property as non-exempt if encumbered by a lien no impairment existed, hence lien avoidance was not applicable.

This state defined "exception" to exemption for lien encumbered property is the basis for denying lien avoidance in Owen as well.

CONFLICT WITHIN THE 11TH CIRCUIT

From the foregoing it appears that the Owen decision can not be reconciled with 11th circuit precedent as stated in In Re Hall, above, and that Owen is most closely aligned with the 5th and 6th circuits. In Hall and in In Re Maddox, 713 F. 2d 1526 (11th Cir. 1983), the 11th circuit clearly adopted the view that states may not "opt out" of lien avoidance and that 522(f) must be applied independently

of the state exemptions. In Owen, however, this position was abandoned for the 5th and 6th circuit propositions that 522(f) could be limited or precluded by state definitions created under 522(b). In short, "impairments" under 522(f) could be reclassified as "exceptions" under 522(b). Although not express, the conflict is, nevertheless, unmistakeable.

STATUTORY INTERPRETATION

Because 522(f) is a federal provision which contains no state option some courts have interpreted the Pine and McManus reasoning as being an impairment or frustration of the federal purpose and therefore contrary to the requirements of the Supremacy Clause. See In Re Pelter, 64 B.R.492 (Bankr WD Okla 1986), In Re Hershey, 50 B.R.329 (DC SD Fla 1985), In Re Taylor, 73 B.R. 149 (9th Cir BAP 1987, see also Judge Dyer's dissent in McManus, 681 F.2d 353, 358 (any conflict

between the state lien conservation provision and the federal lien avoidance provision must be constitutionally resolved in favor of federal law).

It is clear that 522(f) would have no function if the McManus view with respect to state definitions were correct. Such an intent should not be attributed to the Congress. If, indeed, states were to have the power which McManus suggests, it is for the Congress to so provide.

The plain language of 522(f) does indicate that a lien is avoidable where the lien impairs an exemption "to which the debtor would have been entitled." This denotes a condition contrary to fact, a point which is further indicated by the following

> "Subsection (f) protects the debtor's exemptions, his discharge and thus his fresh start by permiting him to avoid certain liens on exempt property. The debtor may avoid a judicial lien on any property to the extent that the property

> could have been exempted in the absence of the lien...The avoidance power is independent of any waiver of exemptions. H.Rep. No. 95-595,95th Cong. 1st Sess. (1977) 362; S.Rep No. 95-989, 95th Cong. 1st Sess. (1978)76 (under Sub-section e); U.S. Code Cong. & Admin. News 1978, pp. 5787, 6318.

The plain language of the code also does not contain any "time of attachment" element under 522(f), although there is an indication in the Owen bankruptcy court opinion that such was a consideration. "Time of attachment" of the lien is not relevant under 522(f). The cases of In Re Hershey, 50 B.R. 329 (DC SD Fla 1985) and In Re Baxter, 19 B.R. 674 (9th Cir BAP 1982) both authorized lien avoidance even though, as in Owen, the lien attached prior to the availability of the exemption.

SUMMARY

Each of the foregoing reasons is sufficient justification for granting the writ. It has been the policy of the state of

Florida to afford liberal construction to the homestead exemption. Quigley v. Kennedy & Ely Insurance, Inc., 207 so. 2d 431 (Fla. 1968). It is also the policy of the Code to assure the debtor a fresh start. Neither interest is served by the construction placed upon the statutory provision in this case. Furthermore, the construction of the code provisions authorized in Owen, which amounts to a recipe for the defeat of federal lien avoidance at the hands of state law, is improper interpretation of the federal statute. It is for Congress to set forth the limitations authorized by Owen and the 5th and 6th circuit cases, yet the Congress has not seen fit to do so.

If the lien in Owen is not avoided the Petitioner's home will be lost, the very property which the state and federal provisions were designed to protect. The exemption, which is of constitutional

origin and magnitude will be defeated by the judgment lien, a mere creature of statute which by its very nature operates indiscriminately upon property and constitutes no estate in the property for the lienholder. See Gilpen v Bower, 12 So. 2d 884 (Fla. 1943).

The lack of uniformity in the application of the lien avoidance provision in states using their own exemptions is continued in Owen, yet requires resolution by this Court. Until resolved by this Court, the divergence of interpretation outlined above will persist and, in some circuits, frustration of Congressional intent will continue.

CONCLUSION

The Petition for Writ of Certiorari should be granted for the foregoing reasons. In the alternative, the Petitioner requests the Court to grant summary reversal pursuant to Rule 23.1 of the Rules of the Supreme Court.

Respectfully submitted,

Isidore Kirshenbaum
1900 Main Street, Suite 214
Sarasota, Florida 34236
(813) 351-2883
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of this Petition have been furnished to John R. Shuman, Esq., 2555 Enterprise Rd., Clearwater, Florida 34623, Attorney for Respondent, Helen Owen, by prepaid first class mail this 19th day of December, 1989.

Isidore Kirshenbaum, P.A.

By _____

1900 Main St., Suite 214
Sarasota, FL 34236
(813) 351-2883
Attorney for Petitioner

APPENDIX

In Re Dwight H. OWEN, Debtor

Dwight H. OWEN, Plaintiff-Appellant

v

Helen OWEN, Defendant-Appellee

No 88-3499

United States Court of Appeals

Eleventh Circuit

July 11, 1989

Appeal from the United States District Court for the Middle District of Florida

Before POWELL*, Associate Justice (Retired), United States Supreme Court, RONEY, Chief Judge, and TJOFLAT, Circuit Judge.

RONEY, Chief Judge:

In this case, both the bankruptcy court

*Honorable Lewis F. Powell, Jr., Associate Justice of the United States Supreme Court, Retired, sitting by designation.

and the district court concluded that 11 U.S.C.A. § 522(f) of the Bankruptcy Code did not permit a debtor to avoid a judicial lien on Florida homestead property when state law creating the homestead exemption would permit the lien to be enforced. We affirm.

The facts are not in dispute. The dates are important to show that the lien was effective prior to the date the debtor obtained homestead status for the property. Creditor Helen Owen obtained a final judgment against the debtor Dwight Owen in Manatee County Circuit Court on December 1, 1975, and a certified copy was recorded in the Sarasota County Public Records on July 29, 1976. Such a recorded judgment becomes a lien upon real property thereafter acquired by the judgment debtor, unless the property was exempt from all judgment liens. B.A. Lott, Inc. v. Padgett, 153 Fla. 304, 14 So. 2d 667 (1943); Porter-

Mallard Co. v. Dugger, 117 Fla. 137, 157 So. 429 (Fla. 1934).

In November 1984, the debtor bought a condominium unit in Sarasota County. At the time of the purchase, the debtor was not entitled to a homestead exemption from judgment liens under Article 10, Section 4 of Florida's constitution, because the section then allowed the exemption only to the "head of a family". An amendment to this section, allowing the exemption for "a natural person" did not become effective until January 8, 1985. Thus, at the time of the purchase, the judgment lien attached to the property.

The debtor filed a Chapter 7 bankruptcy petition in January 1986 and claimed the condominium as Florida homestead property, exempt from administration by the bankruptcy court. Under Florida law, constitutional homestead property is exempt from the claims of creditors not secured by a lien on the

property. See Fla. Stat. §222.20; Fla. Const. Art 10, §4. The bankruptcy court, in an August 13, 1986 order, allowed the property to be exempt from general administration by the trustee, but specifically did not decide whether Helen Owen's judgment lien against the property would be enforceable.

The debtor was discharged on May 13, 1986. In April 1987, however, the debtor was given permission to reopen the bankruptcy case pursuant to 11 U.S.C.A. § 350. He then moved, according to Rule 4003(d), to seek an avoidance of Helen Owen's judgment lien, under 11 U.S.C.A. § 522(f)[1].

After hearing argument, the bankruptcy court on December 1, 1987, granted the

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1. Section 522(f) provides in relevant part: Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is --
(1) a judicial lien...

debtor's motion to avoid the lien. Thereafter, however, Helen Owen filed a timely motion to amend or make additional findings of fact and to alter or amend this order. On February 8, 1987, the bankruptcy court reversed its December 1 ruling, finding for the judgment lienholder, stating;

> Clearly, if at the time the certified copy of the judgment was recorded in the Public Records, the Debtor owned the property but for whatever reason did not qualify to claim the property as homestead, such judgment lien would be clearly non-avoidable under 522(f) of the Bankruptcy Code. As the judgment lien in this case attached before the property qualified as homestead, the judgment lien is not of the type included within the ambit of 522(f)(1) and may not be avoided.

The district court upheld the bankruptcy court's determination that Helen Owen's lien, which substantially predated the acquisition of the property and the filing of the bankruptcy petition, was not avoidable under section 522(f). 86 B.R. 691 (M.D. Fla. 1988).

When a bankruptcy petition is filed, all of the debtor's property becomes the property of the bankruptcy estate. 11 U.S.C.A. § 541(a). After the property comes into the estate, the debtor may claim certain items as exempt from the bankruptcy estate[2]. The federal statute provides a "laundry list" of property available for exemption, unless a state "opts out" of this list and allows its residents to take advantage only of the state-created exemptions.

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2. 11 U.S.C.A. §522(b) provides in relevant part: Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate either--

(1) property that is specified under subsection (d) of this section, [the federal list], unless the state law that is applicable to the debtor under paragraph (2)(A) of this subsection specifically does not so authorize; or, in the alternative,

(2)(A) any property that is exempt under Federal law other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 days immediately preceding the date of the filing of the petition, or for a longer portion of such 180-day period than in any other place...

Florida has chosen to opt out of the bulk of the federal laundry list[3]. Accordingly, Florida state law governs the question of whether property may be exempted from the bankruptcy estate.

The claimed exemption here is created by Florida's constitutional homestead provision. Article 10, § 4 of the Florida Constitution states in part that homestead property is not subject to foreclosure of a judgment lien[4].

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3. See Fla. Stat. § 222.20 (opt out); section 220.201 (allowing exemption described in subsection (d)(10) relating to debtor's rights to receive benefits such as social security and unemployment compensation). Section 222.20 further provides that "[n]othing herein shall affect the exemptions given to residents of this state by the State Constitution and the Florida Statutes."

4. (a) There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field, or other labor performed on the realty, the following property owned by a natural person:
(1) a homestead,...if located within a municipality, to the extent of one-half acre (cont,)

Section 522(f) allows the debtor to avoid certain liens in order to protect against impairment of an exemption to which he would otherwise be entitled. There is no impairment of an exemption here, however. Under state law, the homestead exemption precludes attachment of a judgment lien except where the lien came into existence prior to the property attaining homestead status. Fla. Const. Art. 10, §4; see Bessemer v. Gersten, 381 So. 2d 1344 (Fla. 1980); Aetna Ins. Co. v. LaGasse, 223 So. 2d 727 (Fla. 1969); Volpitta v. Fields, 369 So. 2d 367 (Fla. 4th DCA), cert denied, 379 So. 2d 204 (Fla. 1979); In Re Valdes, 81 B.R. 141 (Bankr. S.D. Fla. 1987). Where, as here, the judgment attached prior to

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4. (cont.) of contiguous land, upon which the exemption shall be limited to the residence of the owner or his family.

the homestead right, there is no impairment because the exemption is specifically subject to this exception.

The debtor here does not dispute that Helen Owen's lien on his property would be enforceable under Florida law because it attached to the property before the debtor was able to avail himself of the homestead right. He argues, though, that section 522 (f) allows him to avoid the lien because he now qualifies for the homestead exemption and if the lien did not exist, he could claim the exemption. In effect, he argues that federal law gives him an exemption that state law would not, even though the exemptions in Florida are defined by state law because of its "opting out" of the federal exemptions.

Congress did not intend through section 522(f), however, to provide a federal exemption greater than that protected by state law where the exemption is created by state

law. The legislative history of section 522(f) indicates that Congress sought to protect debtors from the race to judgment often occurring just prior to a debtor filing bankruptcy. That is, when it appears that a debtor is having trouble meeting his obligations, creditors rush to reduce their interests to judgment, attaching all of the debtor's property, including that which would otherwise be exempt. Thus, when the debtor files, he has no unencumbered property left with which to "make his fresh start." Accordingly, section 522(f) was adopted to

> ...give[] the debtor certain rights not available under current law with respect to exempt property. The debtor may avoid any judicial lien on exempt property, and any non-purchase money security interest in certain exempt property such as household goods. The first right allows the

> debtor to undo the actions of creditors that bring legal action against the debtor shortly before bankruptcy. Bankruptcy exists to provide relief for an overburdened debtor. If a creditor beats the debtor into court, the debtor is nevertheless entitled to his exemptions....

H.R.Rep.No. 595, 95th Cong., 1st Sess., reprinted in U.S.Code Cong. & Ad. News 5787, 6087 (1978). This is not the case here. The debtor never held this property exempt from this judicial lien.

We also hold that the bankruptcy judge acted within his authority under the local rules to issue the February order without affording a hearing to the debtor. Rule 101(c) of the local bankruptcy rules allows the judge to suspend the reguirements of the rules in order for the case to proceed at the court's direction. Further, the court had before it the entire

record and, under the rules, need only afford notice and a hearing as is "appropriate in the particular circumstances." Here, it was appropriate to rule based on the papers filed by the parties.

For the foregoing reasons, the decision of the district court is

AFFIRMED.

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF FLORIDA

IN RE:

DWIGHT H. OWEN

Debtor

_____/

DWIGHT H. OWEN

Appellant

vs Appellate Case No.

HELEN OWEN 88-404-CIV-T-17

Appellee

_____/

APPEAL

FROM THE UNITED STATES BANKRUPTCY COURT

FOR THE MIDDLE DISTRICT OF FLORIDA

ORDER ON APPEAL

This cause is before the Court on appeal from the Order on Motion to Amend or Make Additional Findings entered February 8, 1988, by Bankruptcy Judge Alex-

ander L. Paskay, and request for oral argument. The request for oral argument is denied.

ISSUES:

I. Whether or not the trial court correctly ruled that a debtor could not invalidate a judicial lien, pursuant to s522(f)(1) of the Bankruptcy Code, which preceded debtor's homestead exemption under Florida law and arose prior to debtor's acquisition of the subject property.

II. Whether or not the trial court correctly entered an order on motion to amend or make additional findings of fact pursuant to bankruptcy rule 7052(b) and to alter or amend the order on motion to avoid judgment lien pursuant to bankruptcy rule 9023, without notice and a hearing.

STANDARD OF APPELLATE REVIEW

The applicable standard of appellate review is that findings of fact shall not be set aside unless clearly erroneous.

Griffin v Missouri Pacific Railway Co., 413 F.2d 9 (5th Cir.1969); Bankruptcy Rule 8013. Appellant is entitled to an independent de novo review of all conclusions of law and the legal significance accorded to the facts.

FACTS

Helen Owen obtained a final money judgment against the debtor on December 1, 1975, in Manatee County Circuit Court. The certified judgment was recorded in Sarasota County, Florida, on July 29, 1976, O. R. 1127, Page 1494. At that time Appellant did not own property in Sarasota County. On November 27, 1984, debtor acquired a fee simple ownership of the real property known as Unit No. 304, Embassy House. The deed for the property was recorded in the public records of Sarasota County, on November 27, 1984, O. R. 1732, Page 676.

At that time the debtor was a single

man and not the "head of a family", within the meaning of Article 10, Section 4, Florida Constitution, relating to the homestead exemption. On November 6, 1984, the homestead provision was amended substituting "a natural person" for "a head of a family". The amendment became effective January 8, 1985.

Appellant, a single man, filed a Chapter 7 bankruptcy petition on or about January 13, 1986. The petitioner claimed real property known as Unit 304, Embassy House, located in Sarasota County, Florida, as exempt property in the B-4 of the Florida Constitution and Chapter 222.20, Florida Statutes, exempting homestead property.

A creditor, Helen Owen, filed an objection to the exemption claim on January 22, 1986. On August 13, 1986, the bankruptcy judge overruled the objection and designated the property exempt and immune

from the general administration of the Trustee. The debtor did not resolve the issues of post-petition lien status or debtor's rights as to avoidability or enforceability of Helen Owen's lien.

Appellant was granted discharge on May 13, 1986. On December 15, 1986, the debtor filed an application to re-open the case for the purpose of seeking to avoid the lien of Helen Owen, pursuant to 11 USC 522(f)(1). The case was reopened by the bankruptcy court. On April 13, 1987, the debtor filed a motion to avoid the lien and Helen Owen filed a response. Argument was had before the court on August 21, 1987.

On December 1, 1987, the bankruptcy court entered an order granting the motion to avoid the lien. Thereafter, Helen Owen filed a motion to amend or make additional findings of fact, pursuant to Rule 7052(b), and to alter or amend the order of Decem-

ber 1, 1987. On February 8, 1988, the court entered an order reversing the December 1 ruling. The order found the lien sought to be avoided was not of the type included in Section 522(f)(1) and denied debtor's motion to avoid the lien. This is the order appealed from by Appellant.

DISCUSSION

The Court will address the procedural validity of the bankruptcy court's entry of order on motion to amend, filed February 8, 1988. The order states that the cause was before the court on ex parte consideration of Helen Owen's motion to amend. The court considered the motion to amend and the prior record in the cause. The court did not require or allow a response from debtor to the motion to amend, nor was argument or hearing allowed on the motion.

Upon due consideration, the Court finds the brief of Appellee on this issue

persuasive. The local rules of the bankruptcy court imbues the bankruptcy judge with the power to suspend the requirements of the rules and for proceedings in accordance with the court's direction. Rule 101, Local Rules of the Bankruptcy Court. The Court specifically finds the order of February 8, 1988, to have been entered within the authority of Judge Paskay.

The second issue is whether or not the bankruptcy court was in error in amending its previous order and finding that the lien of Helen Owen on the property in question was not avoidable. Appellant seeks to avoid the lien of Helen Owen under 11 USC s522(f), which states in relevant part:

> Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is --
> (1) a judicial lien;

The judgment of Helen Owen, recorded in the public records on July 29, 1976, attached as a lien, instantly, upon the acquisition of title by the debtor on 27 November 1984. (Appellant brief, pg. 10). A previously attached judgment lien will prevail over an after acquired right of homestead. Pasco v Harley, 75 So. 30 (Fla. 1917); Aetna Insurance Co. v LaGrasse, 223 So. 2d 727 (Fla. 1967); Bessemer v Gersten, 381 So. 2d 1344 (Fla. 1980). Debtor was not entitled to the homestead exemption on the purchase of the real property; the amendment allowing the exemption did not become effective until January 8, 1985. Under state law, the lien would remain enforceable against this homestead property. (Appellant's brief, pg. 11).

The bankruptcy discharge has no effect on the lien. A judgment attaching to property and becoming a lien prior to bankruptcy survives the discharge and remains

enforceable, to the extent of the state law. Barnett Bank v Harris, 421 So. 2d 822 (Fla. 1st DCA 1982); Albritton v General Portland Cement, 344 So. 2d 574 (Fla. 1977). Appellant contends however that 11 USC s522(f), if affirmative action is taken by a debtor to invoke the provisions of that section, renders the lien herein unenforceable.

Section 522(f) provides for the avoidance of security interests on certain exempt items, to the extent the lien impairs an exemption to which the debtor is entitled. Even though Florida has "opted out" of the exemptions provided in 11 USC s522(d), the provisions of s522(f) are applicable to Florida bankruptcy proceedings. In Re Hershey, 50 B.R. 329 (DC SD Fla. 1985). The question before the court is whether the application of s522(f) allows the debtor to avoid the lien of Helen Owen.

Appellee urges the Court to adopt a position that the lien which substantially

pre-dated both the filing of the bankruptcy petition and the debtor's obtaining of homestead rights is not an avoidable lien within the meaning of s522(f). Appellee cites a line of cases for the proposition that "... a judicial lien which attached to an interest in property prior to the debtor's acquisition of that interest is not avoidable pursuant to s522(f)(1)" inasmuch as "the phrase 'an interest of the debtor in property' refers to an unencumbered interest at the time of acquisition." McCormick v Mid-State Bank and Trust Co. 33 B.R. 997 (WD Pa. 1982); In Re: Williams, 38 B.R. 224 (ND Okla. 1984); In Re: Sprick, 78 B.R. 292 (D Kan. 1987).

The Court finds this line of cases persuasive and adopts their reasoning. The Court additionally finds persuasive the arguments of Appellee that debtor never owned an unencumbered interest in the real property in question, since the lien attached

to the property simultaneously with acquisition of the property.

This Court, having carefully considered the two issues on appeal, concludes that the bankruptcy court did not err in determining that the judgment lien of Helen Owen was not avoidable pursuant to 11 USC s522(f) or erroneously deny debtor a hearing on the motion to amend. Accordingly, it is

ORDERED that the order on motion to amend or make additional findings and to alter or amend order on motion to avoid judgment lien, filed February 8, 1988, be affirmed. The Clerk of the Court is directed to enter judgment in accordance with this Order.

DONE AND ORDERED in Chambers, in Tampa, Florida, this 7th day of June, 1988.

/s/Elizabeth A. Kovachevich
ELIZABETH A. KOVACHEVICH
United States District Judge

Copies to:
All parties
and counsel
of record

UNITED STATES BANKRUPTCY COURT

FOR THE MIDDLE DISTRICT OF FLORIDA

TAMPA DIVISION

In Re:

DWIGHT H. OWEN

Debtor Case No 86-106-8P7

ORDER ON MOTION TO AMEND OR MAKE ADDITIONAL FINDINGS OF FACT PURSUANT TO RULE 7052(b) AND TO ALTER OR AMEND THE ORDER ON MOTION TO AVOID JDUGMENT LIEN PURSUANT TO RULE 9023

THIS cause came on for consideration ex parte, upon a Motion to Amend or Make Additional Findings of Fact Pursuant to Rule 7052(b) and to Alter or Amend the Order on Motion to Avoid Judgment Lien Pursuant to Rule 9023 filed by Helen Owen, a creditor in the above captioned Chapter 7 case. The Court has considered the mo-

tion, together with the record, and is satisfied that the Motion is well taken and should be granted. Accordingly, the Order on Motion to Avoid Judgment Lien entered by this Court on December 1, 1987 should be amended as follows:

The Motion to Avoid Judgment Lien was filed by Dwight H. Owen, the Debtor in this Chapter 7 case. The Motion seeks to avoid a judgment lien in favor of Helen Owen. The judgment was obtained on December 1, 1975 and a certified copy was recorded in the Sarasota County Public Records on July 29, 1976.

In November 1984, the Debtor purchased certain real property in Sarasota County, and at this time the judgment of Helen Owen attached to the property.

At the time the Debtor acquired the property and the judgment lien attached, the Debtor was not entitled to claim the property as homestead due to the fact that

he was not a "head of household" as was required under Article X, Section 4 of the Florida Constitution prior to its Amendment. It was not until January 1985, which was the effective date of the Amendment to Article X, Section 4 of the Florida Constitution, which substituted the term "natural person" for the previous term "head of household", that the Debtor was entitled to claim the property as homestead.

Clearly, if at the time the certified copy of the Judgment was recorded in the Public Records, the Debtor owned the property but for whatever reason did not qualify to claim the property as homestead, such judgment lien would be clearly non-avoidable under §522(f)(1) of the Bankruptcy Code. As the judgment lien in this case attached before the property qualified as homestead, the judgment lien is not of the type included within the ambit of §522(f)(1) and may not be avoided.

Accordingly, it is

ORDERED, ADJUDGED AND DECREED that the Motion to Amend or Make Additional Findings of Fact Pursuant to Rule 7052(b) and to Alter or Amend the Order on Motion to Avoid Judgment Lien Pursuant to Rule 9023 be, and the same is hereby, granted. It is further

ORDERED, ADJUDGED AND DECREED that the Order on Motion to Avoid Judgment Lien entered on December 1, 1987 be, and the same is hereby, amended to reflect the changes as set forth in this Order. It is further

ORDERED, ADJUDGED AND DECREED that the Debtor's Motion to Avoid Judgment Lien be, and the same is hereby, denied.

DONE AND ORDERED at Tampa, Florida on February 8, 1988.

/s/Alexander L. Paskay
ALEXANDER L. PASKAY
Chief Bankruptcy Judge

cc:
John R. Shuman for lienholder
Roger L. Fishell, Attorney for Debtor
Dwight H. Owen, Debtor

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No, 88-3499

IN RE: DWIGHT H. OWEN

Debtor

DWIGHT H. OWEN

Plaintiff-Appellant

v.

HELEN OWEN

Defendant-Appellee

Appeal

From the United States District Court

for the Middle District of Florida

ON PETITIONS FOR REHEARING

AND SUGGESTIONS FOR REHEARING IN BANC

(Opinion July 11, 1989, 11 Cir., 1989,

_____ F. 2d _____).

(August 31, 1989)

Before POWELL*, Associate Justice (Retired),

United States Supreme Court, RONEY, Chief

Judge, and TJOFLAT, Circuit Judge.

PER CURIAM:

(X) The Petitions for Rehearing are DENIED and no member of this panel nor other judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions for Rehearing In Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Paul H. Roney

United States Circuit Judge

*Honorable Lewis F. Powell, Jr., Associate Justice of the United States Supreme Court, Retired, sitting by designation.

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 88-3499

D.C. Docket No. 88-00404

IN RE: DWIGHT H. OWEN

Debtor

DWIGHT H. OWEN

Plaintiff-Appellant

v.

HELEN M. OWEN

Defendant-Appellee

APPEAL

From the United States District Court

for the Middle District of Florida

Before POWELL*, Associate Justice (Retired), United States Supreme Court, RONEY, Chief Judge, and TJOFLAT, Circuit Judge.

JUDGMENT

This cause came on to be heard on the

transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED:

IT IS FURTHER ORDERED that plaintiff-appellant pay to the defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

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*Honorable Lewis F. Powell, Jr., Associate Justice of the United States Supreme Court, retired, sitting by designation.

Entered: July 11, 1989

For the Court: Miguel J. Cortez
Clerk

By:/s/ David Maland
Deputy Clerk

ISSUED AS MANDATE: September 8, 1989

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF FLORIDA

DWIGHT H. OWEN

v Case No. 88-404-CIV-T

-17B

HELEN OWEN

JUDGMENT IN A CIVIL CASE

(X) Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That the Bankruptcy Court's Decision is AFFIRMED.

Donald M. Cinnamond
Clerk

Date: June 7, 1988

/s/ Rita J. Cole
Deputy Clerk

FEDERAL

STATUTORY PROVISIONS INVOLVED

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11 U.S.C. § 522(b)

Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate the property listed in either paragraph (1) or, in the alternative, paragraph (2) of this subsection. In joint cases filed under section 302 of this title and individual cases filed under section 301 or 303 of this title by or against debtors who are husband and wife, and whose estates are ordered to be jointly administered under Rule 1015(b) of the Bankruptcy Rules, one debtor may not elect to exempt property listed in paragraph (1) and the other debtor elect to exempt property listed in paragraph (2) of this subsection. If the parties can

not agree on the alternative to be elected, they shall be deemed to elect paragraph (1), where such election is permitted under the law of the jurisdiction where the case is filed. Such property is --

(1) property that is specified under subsection (d) of this section, unless the state law that is applicable to the debtor under paragraph (2)(A) of this subsection specifically does not so authorize; or, in the alternative,

(2)(A) any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 days immediately preceding the date of the filing of the petition, or for a longer portion of such 180-day period than in any other place; and

(B) any interest in property in which

the debtor had, immediately before the commencement of the case, an interest as tenant by the entirety or joint tenant to the extent that such interest as a tenant by the entirety or joint tenant is exempt from process under applicable nonbankruptcy law.

11 U.S.C.§ 522(f)

Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is --

(1) a judicial lien;

FLORIDA

CONSTITUTIONAL PROVISIONS INVOLVED

Article X, Section 4, Florida Constitution

(a) There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty, the following property owned by a natural person:

(1) a homestead, if located outside a municipality, to the extent of one hundred sixty acres of contiguous land and improvements thereon, which shall not be reduced without the owner's consent by reason of subsequent inclusion in a municipality; or if located within a municipality, to the

extent of one-half acre of contiguous land, upon which the exemption shall be limited to the residence of the owner or his family;

(2) personal property to the value of one thousand dollars.

(b) These exemptions shall inure to the surviving spouse or heirs of the owner.

(c) The homestead shall not be subject to devise if the owner is survived by spouse or minor child, except the homestead may be devised to the owner's spouse if there be no minor child. The owner of homestead real estate, joined by the spouse if married, may alienate the homestead by mortgage, sale or gift and, if married, may by deed transfer the title to an estate by the entirety with the spouse. If the owner or spouse is incompetent, the method of alienation or encumbrance shall be as provided by law.

Amended, general election, Nov. 7, 1972; general election, Nov. 6, 1984.

Article XI, Section 5, Florida Constitution

(c) If the proposed amendment or revision is approved by vote of the electors, it shall be effective as an amendment to or revision of the constitution of the state on the first Tuesday after the first Monday in January following the election, or on such other date as may be specified in the amendment or revision.

FLORIDA

STATUTORY PROVISIONS INVOLVED

Chapter 222.20, Florida Statutes

In accordance with the provision of s. 522(b) of the Bankruptcy Code of 1978 (11 USC s522(b)), residents of this state shall not be entitled to the federal exemptions provided in s. 522(d) of the Bankruptcy Code of 1978 (11 USC s522(d)). Nothing herein shall affect the exemptions given to residents of this state by the State Constitution and the Florida Statutes.